

INTERNET CASINO GAMBLING: THE NIGHTMARE OF LAWMAKING, JURISDICTION, ENFORCEMENT & THE DANGERS OF PROHIBITION

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I. INTRODUCTION & OVERVIEW

Internet casino gambling is the elusive speeding car on the information superhighway, weaving through traffic and seemingly immune to efforts that attempt to slow its charge. Legislators attempt to impose laws that can best be described as ineffective, as well as overbroad,¹ and are questionable on the issue of enforcement.² While these laws are debated, Internet casino and sports gambling continues to grow exponentially.³ The puritanical stance taken by opponents stresses the societal ills of gambling, yet continues to lament the financial loss our government endures from prospectively huge, but uncollected, tax revenue.⁴ Internet gambling has come to rival pornography as the most divisive and controversial aspect of World Wide Web content.⁵

Internet gambling can be defined as "[s]ystems of gambling conducted through computers on the Internet system. The systems permit people to

make bets on . . . casino type games such as blackjack, poker, or keno from their home terminals."⁶ Between 1995 and 1996, the number of online casino websites quintupled in number.⁷ Recent estimates show that there could be as many as 1,650 Internet gaming websites currently in operation.⁸ Financially speaking, Internet gaming looms large online. As recently as 2001, it was estimated that the Internet gambling business has already grown into a \$1.5 billion dollar a year industry.⁹ Experts project that by the end of 2003, the revenues generated from online gambling will exceed five billion dollars.¹⁰

America is a gambling nation. U.S. state run lotteries have proliferated in growth since the New Hampshire Sweepstakes Commission first began selling lottery tickets in 1964,¹¹ and the City of Las Vegas legalized casino gambling in 1931.¹² Congressman Barney Frank has advocated, "leave the local people alone and let them gamble if they want to."¹³ Currently, forty-seven states permit

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¹ See *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp.2d 401 (E.D. Pa. 2002) (holding the Children's Internet Protection Act facially invalid for imposing a content based restriction upon free speech on the Internet).

² Combating Illegal Gambling Reform and Modernization Act, H.R. 3215, 107th Cong. (2001) (proposed amendment to 18 U.S.C. §1084) (attempting to envelope all communications under this provision of the Act, Congress redefined the term "wire communication" within the Act to simply read "communication," as such a change was considered necessary due to some communications currently not being sent by wire communication but through other methods).

³ Mike Epifanio, *Bytes & Bets: Finding Casino Related Information and Betting on The Internet*, CASINO PLAYER, Aug.

1996 at 38.

⁴ Rep. Bob Goodlatte, *Putting a Needed Stop to Internet Gambling*, THE HILL, July 10, 2002, at 33.

⁵ Epifanio, *supra* note 3, at 39.

⁶ WILLIAM N. THOMPSON, *LEGALIZED GAMBLING* 277 (1997).

⁷ Epifanio, *supra* note 3, at 39.

⁸ *Unlawful Internet Gambling Funding Prohibition Act and Combating Illegal Gambling Reform Act: Hearing on H.R. 556 and H.R. 3215 Before the House Subcommittee on Crime*, 107th Cong. (2001) (statement of Frank Catania) [hereinafter Catania].

⁹ *Gamblers Get \$1.9 Million in Winnings In One Case as Hackers Scam Net Casinos*, WALL ST. J., Sept. 11, 2001, at B7 [hereinafter *Hackers*].

¹⁰ *Unlawful Internet Gambling Funding Prohibition Act and Combating Illegal Gambling Reform Act: Hearing on H.R. 556 and H.R. 3215 Before The House Subcommittee on Oversight and Investigation of the House Committee on Financial Services*, 107th Cong. (2001) (statement of Sue Kelly, Chairperson).

¹¹ THOMPSON, *supra* note 6, at 11.

¹² *Id.*

¹³ *National Gaming Commission Takes Another Step*, CASINO

some type of legalized gambling activity.¹⁴ These activities include lotteries, land based casinos, riverboat casinos, Indian gaming, horse and dog track betting and charitable gaming.¹⁵ Given this huge supply, and an apparently insatiable demand, it is not at all surprising that online gaming and wagering has experienced such a dramatic increase of operation in recent years.

Federal lawmakers have been dealing with the issue of Internet gaming since 1995. Initial attempts to curb online gaming included imposing fines and jail sentences on those who wished to partake in such activities.¹⁶ Federal lawmakers continue to introduce legislation aiming to enact a blanket prohibition on Internet gambling.¹⁷ A recent proposal, House Resolution 556, Unlawful Internet Gambling Funding Prohibition Act, seeks to prevent online gambling houses from accepting payment via bank instruments, namely credit cards.¹⁸ The House of Representatives passed this bill in October 2002.¹⁹ The resolution's future is unclear at this point because similar bills have passed by vote only to later die in committee hearings.²⁰

A prohibition on Internet gambling sparks a myriad of contentious positions. Opponents of Internet gaming fervently trumpet the societal ills that online wagering will allegedly leave in its wake.²¹ They have consistently expounded the problems of access by addictive gamblers, the protection of children, money laundering, terrorism and organized crime.²² At the same time, however, those same opponents who favor such an absolute eradication of Internet gambling are continually lured into a discussion over the economic issues raised by Internet gaming. In contrast, proponents acknowledge the dangers that may be associated with online gaming, but also recognize the potential long-term benefits if online gaming is properly regulated.²³

Internet gambling pushes the concepts of constitutional freedoms, the abilities and limitations of law enforcement, and the question of who has

jurisdiction over the Internet to the forefront. The Internet has the ability to affect unlimited areas of law, which begs the question, can the United States ("U.S.") government stop an international system of computer data from traversing jurisdictional boundaries without infringing on separation of powers or the individual liberties of its citizens?

The answer to this question is simple. Legalization and regulation of the Internet gaming industry is the best option based on the inherent ineffectiveness any prohibition will create. Legalization and regulation is a system that can provide stability for effective enforcement of laws. Furthermore, this will grant the freedom to allow for strict legislative scrutiny of all provisions and enable lawmakers to delegate the appropriate authority to those who can enforce the regulations effectively. A victory for a total prohibition will merely be vindication for governmental control that wishes to dictate all aspects of American citizens' lives.

Part II of this comment will address the constitutional challenges that can result if a sweeping prohibition is enacted. This will include the First Amendment guarantee to free speech and the Fourth Amendment protection against unwarranted searches.

Part III of this comment focuses on jurisdiction over the Internet. It is capitulated that Internet gaming is an issue of some interstate commerce relevance. Under the Commerce Clause, it would appear that the Constitution grants the power to regulate Internet gambling solely to Congress.²⁴ Though Internet gambling may be an issue of some importance to interstate commerce, it may not be a commerce issue in which federal lawmakers can assert supremacy. Current federal legislation and the proposed mechanisms for implementing prohibitions are also discussed and analyzed to ascertain if such restrictive acts could withstand judicial review and scrutiny. Lastly, due to the fact that gaming is not an industry which

J. NAT'L GAMING SUMM. (Nat'l Gaming Industry, West Atlantic City, N.J.), Mar. 4, 1996, at 1.

¹⁴ THOMPSON, *supra* note 6, at 11.

¹⁵ *Id.* at 163-166.

¹⁶ Penalties Outlined For Internet Gambling, CASINO J. NAT'L GAMING SUMM. (Nat'l Gaming Industry, West Atlantic City, N.J.), Feb. 26, 1996, at 3.

¹⁷ See Unlawful Internet Gambling Funding Prohibition Act, H.R. 556, 107th Cong. (2001).

¹⁸ H.R. REP. NO. 107-339, pt. 1, at 10 (2001).

¹⁹ House passes bill to keep net gamblers from using credit cards, USA Today Online, Oct. 2, 2002, at http://www.usatoday.com/tech/news/techpolicy/2002-10-02-net-gambling_x.htm.

²⁰ Senate Passes Internet Gaming Ban, CASINO J. NAT'L GAMING SUMM. (Nat'l Gaming Industry, West Atlantic City, N.J.), July 27, 1998 at 1.

²¹ Goodlatte, *supra* note 4, at 33.

²² *Id.*

²³ See Catania, *supra* note 8.

²⁴ U.S. CONST. art. I, §8.

the federal government normally regulates, the issue of states' rights is addressed in terms of capacity and police power to monitor Internet gambling activities.²⁵

Part IV of this comment addresses the positions and concerns of those who desire an outright ban on Internet gaming. The issue of gambling is discussed as a divisive issue in Congress and is examined from the viewpoints of both opponents and supporters. Past bills and their exceptions are also analyzed. Historical and contemporary examples of prohibition will be examined, including a discussion of the Eighteenth Amendment and the Prohibition Era, as well as the "War on Drugs."

The social concerns of opponents are also addressed. The concerns of protecting children and problem gamblers are a mainstay of the opposition's platform. Prohibition supporters also rely on the social ills of bankruptcy and suicide in order to lend credence to their positions.²⁶ The more pressing concerns of terrorist money laundering and infiltration of organized crime are also discussed. It is acknowledged that these are problems that cannot be purged from society by systematic removal of privileges that can be enjoyed by U.S. citizens. Furthermore, it is acknowledged that these are privileges that are available in numerous formats, including state-run lotteries and casinos, among others.²⁷ Moreover, unlike many other illicit activities, these are activities on which taxes are regularly imposed and collected by the federal government.

In Part V, a solution of legalization and strict regulation will be proposed. A template for legalization, modeled after current federal law, is presented. Further guidelines for an effective system are outlined. This proposal will acknowledge the concerns of opponents and attempt to integrate those desires into workable, constitutional, and functional framework between government concerns and Internet gaming.

II. THE CONSTITUTIONAL OBSTACLES

A. First Amendment Consideration: Does Freedom of Speech Apply to The Internet?

The First Amendment of the United States Constitution guarantees the right to freedom of speech.²⁸ Resolving the issue of whether or not the First Amendment applies to the Internet is the first imperative in order to establish whether Internet gaming could be legalized at all. Efforts to regulate the Internet in the past have encountered severe criticism as being in violation of the First Amendment. The Supreme Court has decided such cases and it has held the First Amendment right to free speech is protected on the Internet.²⁹

The Supreme Court took the inevitable plunge into the question of Internet free speech in 1997 with *Reno v. ACLU*.³⁰ At issue were two provisions of the Communications Decency Act of 1996.³¹ The act was legislated in order protect minor children from obtaining harmful or sexually explicit material online.³² The Court struck down this act as unconstitutional³³ because it "lack[ed] the precision that the First Amendment requires when a statute regulates the content of speech."³⁴ The Court's opinion was instrumental in that it provided a major victory for the rights of Internet users³⁵ and acknowledged the potential vagueness of such statutes.³⁶

The holding in *Reno* was acknowledged in the Supreme Court's recent decision in *Ashcroft v. ACLU*,³⁷ which tentatively upheld the Child Online Protection Act ("COPA").³⁸ The Court in *Ashcroft* was careful to note that it was not expressing any view as to the overbreadth of COPA, but it was only upholding the law because of its reliance on community standards.³⁹ However, due to its potential overreaching principles, the Court stated "the Government remains enjoined from enforcing COPA absent further action by the lower courts."⁴⁰ From this portion of the ruling, the

²⁵ See 25 U.S.C. §2710 (d)(3)(C)(ii) (2001).

²⁶ Rep. Bob Goodlatte, *The Growing problem of Internet gambling*, THE HILL, Aug. 1, 2002, at 15.

²⁷ THOMPSON, *supra* note 6, at 11.

²⁸ U.S. CONST. amend. I.

²⁹ See generally *Reno v. ACLU*, 521 U.S. 844 (1997); *Am. Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401 (2002).

³⁰ *Reno*, 521 U.S. at 849.

³¹ *Id.* at 849, 857-860.

³² *Id.* at 849.

³³ *Id.* at 849, 882.

³⁴ *Id.* at 874.

³⁵ *Id.* at 871-74.

³⁶ *Id.* at 871-72.

³⁷ *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

³⁸ Child Online Protection Act, 47 U.S.C. §231(a)(1) (2001).

³⁹ See *Ashcroft*, 535 U.S. at 568.

⁴⁰ *Id.*

Court appears reluctant to rule on the issue of whether or not the law is in violation of the First Amendment, but does find that the law is overly broad.⁴¹

The First Amendment right to free speech on the Internet was again validated in the recent decision of *American Library Ass'n, Inc. v. United States*.⁴² The United States District Court for the Eastern District of Pennsylvania struck down the Children's Internet Protection Act ("CIPA").⁴³ The law required public libraries to use Internet filtering software on their public access terminals or suffer partial elimination of federal funding.⁴⁴ The plaintiffs argued that the law was facially unconstitutional because "CIPA's conditions effectively require libraries to impose content-based restrictions on their patrons' access to constitutionally protected speech."⁴⁵ The Court, throughout the text of the opinion, makes references to standards of strict scrutiny and the principle of overbreadth,⁴⁶ and explicitly states, "that CIPA's constitutionality fails even under [the] more restrictive test of facial validity . . ."⁴⁷ Although this particular case dealt with the filtering mechanisms that libraries were required to use under CIPA,⁴⁸ the holding undeniably supports the notion that our First Amendment rights extend to the Internet.

These cases confirm that the right to free speech does exist on the Internet.⁴⁹ Presumptively, laws designed to regulate Internet content must be extraordinarily specific as to the type of content being regulated, and that type of content must be a proscribed area of restricted speech in order to fall within the limited restrictions on First Amendment free speech.⁵⁰ Even if the necessary language is present, it does not guarantee that the law will be able to withstand strict scrutiny.

It must be conceded that advocates of Internet

gambling cannot rely on the judiciary to include the right to gamble as a provision of free speech. Gambling, in and of itself, is not free speech.⁵¹ However, the Supreme Court has ruled that a federal law prohibiting the advertisement of private casino gambling is in violation of the First Amendment.⁵² In *Greater New Orleans Broadcasting Ass'n v. United States*,⁵³ Justice Stevens makes reference to the unwillingness of Congress to adopt any national policies regarding private casinos, and generally defers such legislation to the respective states.⁵⁴ While this opinion may not be vindication for gambling as free speech, it does assert the existence of commercial speech as free speech. As such, it may not be restricted if the content is both true and does not corrupt a substantial interest of the government.⁵⁵

The current trend in controversies pertaining to the Internet is that the courts tend to favor the Internet's potential utilizations; the right to free speech and the rights of Internet users.⁵⁶ Moreover, it is the province of the courts to nullify those laws that, if left unchallenged, will have a negative impact on the future of this still vastly unmapped ocean of information. As these examples demonstrate, regulation of internet content has the potential to become a Pandora's box for challenge and litigation that will likely result in those laws being struck down as restrictive of content. Though free speech does exist on the Internet, the First Amendment does not end the potential for constitutional challenges to an Internet gambling prohibition.

B. The Fourth Amendment: What is the Expectation of Privacy on the Internet?

Any act that would strictly outlaw Internet gambling is destined to encounter some controversy flowing from the Fourth Amendment.⁵⁷ The

⁴¹ *Id.*

⁴² 201 F. Supp. 2d 401 (E.D. Pa. 2002).

⁴³ Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763A (2000).

⁴⁴ *Id.*

⁴⁵ *Am. Library Ass'n*, 201 F. Supp.2d at 407.

⁴⁶ *Id.* at 451-454.

⁴⁷ *Id.* at 453.

⁴⁸ *Id.* at 408-410.

⁴⁹ See generally *Reno*, 521 U.S. 844; *Am. Library Ass'n*, 201 F. Supp.2d 401.

⁵⁰ See generally *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (holding that a "burning cross" is not a form of free speech that can be restricted under the First Amendment).

⁵¹ I. Nelson Rose, *Understanding The Law of Internet Gambling*, (Apr. 27, 2001), at http://www.gamblingandthelaw.com/internet_gambling.html.

⁵² See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188-89 (1999).

⁵³ *Id.*

⁵⁴ *Id.* at 187.

⁵⁵ *Id.* at 183-186.

⁵⁶ See generally *Reno*, 521 U.S. 844; *Am. Library Ass'n*, 201 F. Supp. 2d 401.

⁵⁷ U.S. CONST. amend. IV ("[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

Fourth Amendment of the U.S. Constitution grants citizens a qualified right to privacy.⁵⁸ The benefit of the right must be weighed against the benefit to society, and then it must be applied to the reasonableness of the individual's expectation of privacy.⁵⁹

With regard to privacy concerns and Internet communications, there is currently a wealth of developing case law, some of which has upheld that Internet transmissions are not of one's own private domain.⁶⁰ In certain cases, courts have stated that there is no reasonable expectation of privacy online.⁶¹ The absence of an expectation of privacy is exacerbated by increased technology that could violate Fourth Amendment protection against unwarranted searches.⁶² However, the factor that distinguishes a number of these situations in which a Fourth Amendment right has been asserted, but denied, is that the activities being prosecuted are activities that are illegal in all states.

Fourth Amendment privacy rights offer no protection for patently illegal activities, such as child pornography. In *United States v. Butler*,⁶³ the court ruled on a case concerning a college student that used a shared access computer to download obscene images of children.⁶⁴ In striking down the defendant's Fourth Amendment right to privacy, the United States District Court for the District of Maine, "conclude[d] that in 2001 there [was] no generic expectation of privacy for shared usage on computers at large."⁶⁵ This zero tolerance prohibition against child pornography was given further examination in *United States v. Cox*.⁶⁶ In this case, the Fourth Amendment assertions of the defendant were denied as violations of 18 U.S.C. §§ 2252(a)(2)(A), (5)(B) for "receipt, distribution and possession of child pornography."⁶⁷

These cases deal with an activity that is unquestionably harmful and socially unacceptable worldwide. Thus, their relevance to the idea of Internet casino gaming is distinguishable because one cannot rationally reconcile the two activities. This distinction turns on the fact that gambling is largely a state-sponsored activity. An activity that is widespread and routinely condoned by state governments is not synonymous with child pornography.

Case law addressing the use of computers is still evolving. However, a pattern involving the expectation of privacy on an office or shared computer has emerged. In the recent case of *Leventhal v. Knapek*,⁶⁸ the Second Circuit outlined the expectation of privacy one should anticipate from an employer.⁶⁹ The court held that an employee has a reasonable expectation of privacy on his office computer, but also clarified that not every search would be a Fourth Amendment violation.⁷⁰ The court in this case determined the search to be reasonable based on probable cause. However, the court was careful to point out that any search pertaining to an employer and employee will be justified if based on reasonable suspicion of employee malfeasance.⁷¹

The Court's holdings in *Butler* and *Cox* help explain the effect of *United States v. Slanina*.⁷² In *Slanina*, the defendant faced charges for keeping images of child pornography on a work computer. While the court concluded that the defendant did have a reasonable expectation of privacy on his work computer,⁷³ the search performed by a law enforcement official did not require a warrant. The fact that other material previously discovered violated city policy meant that the investigation was considered routine and thus not a warrantless

⁵⁸ See, e.g., *State v. Gambrella*, 633 So.2d 595, 604 (La. 1993) (holding that "the right to privacy is not absolute; it is qualified by rights of others").

⁵⁹ *Katz v. United States*, 389 U.S. 347, 352-357 (1967) (holding that recording of conversations from a phone booth without a warrant is a violation of the defendant's Fourth Amendment right).

⁶⁰ See *United States v. Cox*, 190 F. Supp. 2d 330 (N.D.N.Y. 2002) (denying to discharge crime of receiving and distributing child pornography); *United States v. Butler*, 151 F. Supp. 2d 82 (D.Me. 2001) (ruling that defendant did not have expectation of privacy while using university computer to download child pornography); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D.Kan. 2000) (stating that one who receives and possesses materials of child pornography online has no rational expectation of privacy from Internet service provider).

⁶¹ See *Butler* 151 F. Supp. 2d at 83; *Cox* 190 F. Supp. 2d at 331-32.

⁶² See Johnny Gilman, *Carnivore: The Uneasy Relationship Between The Fourth Amendment And Electronic Surveillance Of Internet Communications*, 9 COMM'LAW CONSPECTUS 111, 112 (2001).

⁶³ 151 F. Supp. 2d 82 (D.Me. 2001).

⁶⁴ *Id.*

⁶⁵ *Id.* at 84.

⁶⁶ 190 F. Supp. 2d 330 (N.D.N.Y. 2002).

⁶⁷ *Id.* at 331-32.

⁶⁸ 266 F.3d 64 (2d Cir. 2001).

⁶⁹ *Id.*

⁷⁰ *Id.* 68-72.

⁷¹ *Id.* at 75.

⁷² 283 F.3d 670, 671 (5th Cir. 2002).

⁷³ *Id.* at 676.

search.⁷⁴

To date, there have been no cases before the Supreme Court that pertain specifically to Internet gambling and a person's reasonable expectation of privacy in their home. The Court is still active in protecting the right of a citizen in their own home against unreasonable searches,⁷⁵ but the lingering problem is that Fourth Amendment protection has not been extended to Internet communications.⁷⁶ Furthermore, problems that remain regarding technological developments⁷⁷ could result in the seizure of online material not included in a warrant.⁷⁸ The problem is perpetuated by the possibility that federal law enforcement could commandeer Internet service providers to police online communications.⁷⁹

The protections of the Fourth Amendment, as it would apply to Internet gambling, may very well be an issue that is simply not ripe for adjudication. However, the interest in protecting the untapped resources of the World Wide Web, coupled with the interest in protecting personal privacy from unwarranted government intrusions show that any prohibition on Internet gambling could violate these constitutional guarantees. This assertion is based on the fact that laws forbidding limitations on free speech online have been struck down regularly.⁸⁰

Though one may regard gambling as expressive conduct, it is not a form of speech.⁸¹ Supreme Court decisions favor no restrictions on Internet content,⁸² which could be extended to include online gambling sites. The fact that gambling online is not a patently illegal activity in this country, in comparison to an immoral activity such as viewing child pornography online, supports the position that courts will have difficulty justifying a prohibition. Nevertheless, the right to privacy must first be applied to Internet gambling. The benefit

of the right must then be weighed against the benefit to society, and then it must be applied to the reasonableness of the individual's expectation of privacy online.⁸³

III. THE NIGHTMARE OF JURISDICTION

A. Federal Jurisdiction & Its Limitations: The Current State Of Prohibition Legislation

Congress has the power "[t]o regulate commerce with foreign Nations, and among the several states"⁸⁴ This power gives Congress the right to regulate transactions with foreign entities, not to specifically regulate activities within these foreign nations. The Commerce Clause⁸⁵ additionally grants power to Congress to exercise authority over any activity that affects commerce between the states.⁸⁶ It must be conceded, by both opponents and supporters, that Internet casino gambling is a matter that will undoubtedly affect interstate commerce. However, the interstate commerce argument can only extend federal jurisdiction so far.

There are currently no legal online casinos operating in the United States that accept wagers from patrons.⁸⁷ Many local casino operators maintain what are called "for fun" casinos.⁸⁸ Since there are no monetary wagers accepted on these sites, there is no affect on commerce. Federal lawmakers have spent a number of years trying to devise some type of legislation that can limit Internet gambling. In 1996, with the passage of H.R. 497⁸⁹ and the creation of the National Gaming Impact Study Commission ("Commission"),⁹⁰ Congressional leaders began to grapple with the issues surrounding Internet gaming. Upon its creation, the Commission was immediately under fire in both houses of Congress.⁹¹ Still, Internet

⁷⁴ *Id.* at 679.

⁷⁵ See *Kyllo v. United States*, 533 U.S. 27, 31-34 (2001) (stating that the use of advanced policing technology to obtain information that was otherwise unavailable without physical intrusion of the premises constitutes unwarranted search).

⁷⁶ Gilman, *supra* note 62, at 111, 112.

⁷⁷ *Id.*

⁷⁸ *Id.* at 112.

⁷⁹ Frank J. Eichenlaub, *Carnivore: Taking A Bite Out Of The Fourth Amendment?*, 80 N.C.L. REV. 315, 323-324 (2001).

⁸⁰ See generally *Am. Library Ass'n*, 201 F. Supp. 2d 401.

⁸¹ Rose, *supra* note 51.

⁸² See generally *Reno*, 521 U.S. 844; *Am. Library Ass'n*, 201 F. Supp. 2d 401.

⁸³ Eichenlaub, *supra* note 79, at 342.

⁸⁴ U.S. CONST. art. I, §8, cl. 3.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Rose, *supra* note 51.

⁸⁸ Thomas E. Weber, *Online Gambling Gets Head Start From Flood Of Play-For-Fun Casinos*, WALL ST. J., June 11, 2001, at B1.

⁸⁹ See H.R. 497, 104th Cong. (1996).

⁹⁰ *House Passes Gaming Commission Bill*, CASINO J. NAT'L GAMING SUMM. (Nat'l Gaming Industry, West Atlantic City, N.J.), Mar. 11, 1996, at 1-2.

⁹¹ *Id.* (containing statements from House Representatives condemning the bill as against personal liberty and states rights); See *National Gambling Commission Delayed By Senate Fireworks*, CASINO J. NAT'L GAMING SUMM. (Nat'l Gaming

gambling continues to receive floor time. In 1998, the prohibitionist movement won its first major victory⁹² when the Senate passed the Internet Gambling Prohibition Act.⁹³ Eventually, this act failed due to differences in a similar House Bill⁹⁴ and the position of President Clinton that gaming is an issue that must be undertaken at the state level.⁹⁵

With all Internet casinos operating offshore, lawmakers have taken new paths to try and stop Internet gambling. The recent trend in the government's attempt to ban Internet gambling has targeted the ability of credit card companies to pay offshore operators for losses on their websites under the Unlawful Internet Gambling Funding Prohibition Act ("UIGFPA").⁹⁶ This new piece of legislation aims to pull the rug out from under Internet casinos operating offshore by negating their ability to be paid by those who incur losses on their sites.⁹⁷ Recently, credit providers have attempted to limit a customer's right to credit.⁹⁸ For example, in 1999 Provident Bank stated that it would "no longer process gambling transactions on its 11 million customers' Visa cards."⁹⁹ In 2002, online payment system PayPal was purchased by Internet auction site eBay.¹⁰⁰ eBay immediately announced that upon completion of the sale, it would suspend all funding allocated to PayPal's Internet gambling system because of the uncertainty surrounding any prohibition or future regulation of Internet casino gambling.¹⁰¹

Could it be said that the UIGFPA is simply a step in the direction of limiting the scope of Internet commerce to become a system of complete government control? Upon closer analysis, the UIGFPA may not be able to measure up to its own

language. Throughout the bill, specific exceptions are made for online stock and commodities trading,¹⁰² while failing to acknowledge recent market slides, corporate scandals, and the fact that Internet stocks, between 2000-2001, plummeted by as much as ninety percent and lost millions in investor capital.¹⁰³ Furthermore, the UIGFPA all but contradicts itself by effectively authorizing states to allow such gaming activity because prohibited activity does not include "any lawful transaction with a business licensed or authorized by a State"¹⁰⁴ but at the same time, it specifically bans bets or wagers.¹⁰⁵ This language is a facial contradiction. If a state licensed authority is authorized to accept bets and wagers, the law becomes redundant because any state with casino operations has jurisdiction under the Unlawful Internet Gambling Funding Prohibition Act to enforce the law. Moreover, the individual state has the sole discretion over licensing the gaming activity. The UIGFPA was passed by a unanimous House vote on October 1, 2002.¹⁰⁶ Whether or not UIGFPA will be regarded as a valid exercise of Congressional power or a violation of what Congress' authority remains to be determined.

The companion to the UIGFPA is H.R. 3215, the Combating Illegal Gambling Reform and Modernization Act ("CIGRMA"). CIGRMA is effectively an amendment to the Federal Wire Act,¹⁰⁷ which imposes criminal penalties on those within the United States for gambling online.¹⁰⁸ Much like its companion bill, certain exceptions are made to facilitate specific activities such as transmission of payment information for securities transactions.¹⁰⁹ CIGRMA does not prohibit the transmission of certain information between

Industry, West Atlantic City, N.J.), Apr. 29, 1996, at 1.

⁹² *Senate Passes Internet Gaming Ban*, *supra* note 20, at 1.

⁹³ S. 474, 105th Cong. (1997).

⁹⁴ *Senate Passes Internet Gaming Ban*, *supra* note 20, at 1.

⁹⁵ *Clinton Calls Gambling An Issue For The States*, CASINO J. NAT'L GAMING SUMM. (Nat'l Gaming Industry, West Atlantic City, N.J.), March 18, 1996, at 1 [hereinafter *Clinton Calls Gambling*].

⁹⁶ Unlawful Internet Gambling Funding Prohibition Act, H.R. 556, 107th Cong. §3(a)(1)-(2) (2001).

⁹⁷ *Id.* at §3(a)(1) ("No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling-credit, or the proceeds of credit.")

⁹⁸ *See Internet Gaming Update: Death Knell For Key To Online Play?*, CASINO J. NAT'L GAMING SUMM. (Nat'l Gaming Industry, West Atlantic City, N.J.), Dec. 20-27, 1999, at 7.

⁹⁹ *Id.*

¹⁰⁰ Nick Wingfield, *Leading the News: PayPal Is Asked for Information On Online Gambling by Spitzer*, WALL ST. J., July 12, 2002, at A3. PayPal, a credit-based system of online payment backed by a funding instrument, rose to prominence in the technology boom of the 1990s.

¹⁰¹ *Id.*

¹⁰² *Id.* at § 3(b)(1)(E)(i)(ii).

¹⁰³ Larry Bauman, *Small-Stock Focus: Cardiac Science, InVasion Surge Amid Overall Rise for Small-Caps*, WALL ST. J., Nov. 30, 2001, at C6.

¹⁰⁴ H.R. 556 §3(b)(1)(E)(ix).

¹⁰⁵ *Id.*

¹⁰⁶ *See House Passes Bill*, *supra* note 19.

¹⁰⁷ 18 U.S.C. §1084 (2000).

¹⁰⁸ Combating Illegal Gambling Reform and Modernization Act, H.R. 3215, 107th Cong. §3(b)(1)(D) (2001).

¹⁰⁹ *Id.* §2(6)(C)(i).

state lotteries and foreign lotteries, nor does it prohibit any transmission within state boundaries to a licensed gaming operation within the same state.¹¹⁰ Once again, CIGRMA appears to reserve the question of Internet gaming to the respective states in which wagers are being placed.

A major point that these proposed laws neglect to consider is the concept of PayPal-style payment systems. The idea that PayPal is the only source of online payment available, or that will be available in the future, is not forward thinking with the technological advances available on the Internet.¹¹¹ A likely result, should either bill become law, is an alternative system of online payment that does not recognize payment recipients. This scenario could create a blind e-commerce that could not be regulated and could exacerbate concerns about money laundering.¹¹²

B. Gambling In The United States: A Federal Question?

There is currently no federally sponsored gaming in the United States, only a Commission to study the effects of gambling.¹¹³ To date, the only major Congressional enactment to be ratified authorizing legalized gambling is the Indian Gaming Regulatory Act ("IGRA").¹¹⁴ This act is distinguishable, however, from the traditional authority of the individual states to regulate gambling because the legislative power is expressly granted to Congress by the Commerce Clause's enumerated power to regulate commerce with the Indian Tribes.¹¹⁵ Moreover, IGRA was specifically designed to delegate power to the individual states to negotiate with the various Indian tribes to create these gaming establishments.¹¹⁶ Under the

terms of this provision, two rational conclusions can be reached: (1) Congress knew that this kind of law relating to gaming was within the province of the individual states, or (2), the federal government did not intend to infringe upon states' rights and, thus, granted states the power to license and regulate Indian casinos.

At this time, all legal gambling activity, apart from Indian gaming,¹¹⁷ is solely regulated and controlled by legislative and police power on the state level.¹¹⁸ The fact that the federal government has chosen not to regulate this area of law requires an assessment of states rights in the face of interstate commerce.

C. States Rights & Traditional Jurisdiction of The States

The Constitution clearly grants Congress the power to regulate commerce.¹¹⁹ Potentially, this authority also allows Congress to extend its powers to regulate illegal gaming activities beyond its jurisdiction.¹²⁰ However, the inevitable problems of enforcing any substantive statute in the online medium creates an issue that could be policed by the individual states.

The CIGRMA¹²¹ makes the concession that if gambling is conducted within state boundaries and by a state licensed operator, it is not a violation of the law.¹²² This raises the long-standing point that gambling has traditionally been an industry that the federal government has reserved for the states. Constitutionally speaking, Internet gambling may be an issue in which the states will have to yield to the supremacy of federal legislation.¹²³ Despite the supremacy power of the federal government, the question of Internet gam-

¹¹⁰ *Id.* §§3(c)(3), (e)(1).

¹¹¹ *Unlawful Internet Gambling Funding Prohibition Act and Combating Illegal Gambling Reform Act: Hearing on H.R. 556 and H.R. 3215 Before The House Subcommittee on Oversight and Investigation of the Committee on Financial Services*, 107th Cong. (2001) (testimony of Sebastian Sinclair, Vice President, Christian Capital Advisors, LLC).

¹¹² Press Release, Interactive Gaming Council, Statement of Sue Schneider, Chairman, Interactive Gaming Council (IGC) on House Passage of the Unlawful Internet Gambling Funding Act, at www.igcouncil.org/read_news2.php?id=78 (Oct. 2, 2002) [hereinafter Schneider].

¹¹³ *House Passes Gaming Commission Bill*, *supra* note 90, at 1.

¹¹⁴ 25 U.S.C. §2710 (2000).

¹¹⁵ U.S. CONST. art. I, §8, cl. 3.

¹¹⁶ 25 U.S.C. §2710(a)(b).

¹¹⁷ See 25 U.S.C. §2710.

¹¹⁸ *Greater New Orleans*, 527 U.S. at 186-187 ("Despite its awareness of the potential social costs, Congress has . . . enacted other statutes that reflect approval of state legislation that authorizes a host of public and private gambling activities.").

¹¹⁹ U.S. CONST. art. I, §8, cl. 3 ("[Congress shall have Power] to regulate Commerce with foreign Nations and among the several States.").

¹²⁰ *Id.*

¹²¹ H.R. 3215.

¹²² *Id.* §§3(c)(3)(e)(1).

¹²³ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (opinion by Chief Justice Marshall stating that should there be any conflict between state and federal law, the supremacy of federal law takes precedence).

bling may come down to a question of police power and whether the federal government is properly equipped to deal with the substantial demand for Internet gambling. Additionally, it is consistent in our nation to have states control their own affairs with regard to gambling activities. Perhaps gambling is an issue in which the sovereign states may be immune from federal interference under the Tenth Amendment.¹²⁴

In 1996, President Clinton acknowledged that gambling was an issue for the states to regulate, police, and tax at the state level as this responsibility does not come under the power of the federal government.¹²⁵ The fact that gaming is designated as a state activity is a matter that has received support from a bipartisan voice in Congress during recent years.¹²⁶

The Supreme Court has also confirmed that gaming is an issue that must be dealt with by individual states. In the case of *Seminole Tribe v. Florida*,¹²⁷ the court struck down a provision of the Indian Gambling Regulatory Act under the Eleventh Amendment as an unconstitutional abrogation of a state's sovereign immunity.¹²⁸ Chief Justice Rehnquist summarized that the Commerce Clause does not grant Congress unchecked power to breach the sovereign power of the states:

[This] rationale would mean that where Congress has less authority, and the States have more, Congress' means for exercising that power must be greater. We read the plurality opinion to provide just the opposite. Indeed, it was in those circumstances where Congress exercised complete authority that Justice Brennan thought the power to abrogate most necessary.¹²⁹

Seminole Tribe is a major declaration that Congress' power to abrogate a state's sovereignty can only be upheld when such an abrogation is in an area of law in which Congress exercises the greatest control.¹³⁰ This conclusion leads to the supposition that gaming is not an area where the federal government exercises a degree of control greater than that of the states. Although gambling online

is an issue that will undoubtedly affect interstate commerce, it is not an industry that Congress has unchecked power to regulate. This possible problem of contrasting a state's priority over gaming with the commerce power is reconciled and resolved in the concurring opinion of Justice O'Connor.¹³¹ Justice O'Connor acknowledges, "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is in an area . . . that is under the exclusive control of the Federal Government."¹³² This reaffirms the proposition that some federal regulation of commerce must yield to the states.

In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*,¹³³ Justice Stevens notes "[t]hat Congress has generally exempted state-run lotteries and casinos from federal gambling legislation reflects a decision to defer to, and even promote, differing gambling policies in differing states."¹³⁴ This opinion further reinforces the assertion that gaming is an issue that must be undertaken at the state level.

Though interstate commerce is an area of control for the federal government, it does not translate into an unchecked power to infringe upon states' rights. States that allow for certain types of gaming have taken up the legislative torch in an attempt to pull in the reins on Internet gaming.¹³⁵ Much like federal laws, many of the bills that have been proposed are so expansive and vague that they would strike down most legal gaming ventures.¹³⁶ On the other hand, these proposed bills are also careful to make certain exceptions for state licensed and state operated facilities in order to protect substantial local interests. For example, South Dakota, which sponsors a state lottery and licensed casinos, proposed such a bill in 2000.¹³⁷ The bill was careful to exclude the state lottery and local casino operations by specifying that "[t]his Act does not apply to the South

¹²⁴ U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.").

¹²⁵ *Clinton Calls Gambling*, *supra* note 95, at 1.

¹²⁶ See *National Gaming Commission Takes Another Step*, *supra* note 13, at 1.

¹²⁷ 517 U.S. 44 (1996) (holding that sovereign immunity of the states under Eleventh Amendment of the U.S. Constitution barred Florida Seminole Indian Tribe from bringing suit against the state for denial of permission to open an Indian Casino). This case overrules the holding of *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), which stated that in regulat-

ing commerce, states must relinquish their immunity where Congress finds it necessary. *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 61-62.

¹³⁰ *Id.*

¹³¹ *Id.* at 72.

¹³² *Id.*

¹³³ 527 U.S. 173 (1999).

¹³⁴ *Id.* at 187.

¹³⁵ Rose, *supra* note 51.

¹³⁶ See *Id.*

¹³⁷ See *Id.*

Dakota Lottery and its licensees . . . or to the South Dakota Commission on Gaming and its licensees.”¹³⁸ A similar bill was signed into law in Michigan in 1999.¹³⁹ The law effectively made it a felony to place a bet or gamble on the Internet, but also defined the word “gambling” as not inclusive of any form of legalized gambling authorized under Michigan state law.¹⁴⁰ These states appear to want their own way on both sides of this issue. While disallowing Internet gaming vendors to operate, lawmakers are also interested in protecting special interests that serve to fill the state’s own coffers. This ‘one hand washing the other’ approach of state legislatures is illustrative of the position taken by many lawmakers in dealing with the issue of Internet gaming.

The State of Nevada’s proactive approach is an exception to this mentality. In July 2002, the state legislature presented guidelines for the expansion of Internet gaming.¹⁴¹ While Internet gambling has yet to be legalized by the state, the statute authorizes lawmakers, pending further investigation by the state, to explore options for regulations, licensing and operation of online gaming.¹⁴² This new law surfaces in the wake of discussions among Las Vegas city officials to license the city name and seal to Internet gaming vendors in the future.¹⁴³ This legislative foresight considers an issue that the federal government cannot seem to grasp: the ability to effectively utilize state police power to control Internet gambling.

D. Policing Internet Gaming Activities: Best Left To The States

Internet gambling is a considerably widespread activity,¹⁴⁴ and it is difficult to state how gaming could be best policed in practice. A total prohibition is an unworkable solution. In addition, federal lawmakers are currently ensconced in the War on Terrorism and the conflict in Iraq.¹⁴⁵ Consequently, the government is devoting many, if not all, federal resources to the fight against ter-

rorism. It is therefore prudent to concede that the states are better equipped to police this type of activity. The ability to monitor Internet users, while raising once again the issue of privacy, is something that law enforcement of individual states have asserted in the past.

In *New York v. World Wide Interactive Gaming Corp.*,¹⁴⁶ the Supreme Court of New York determined whether the state government could enjoin a corporation from offering Internet gambling to New York residents. The defendant sought to dismiss for lack of personal jurisdiction because the gambling transactions occurred offshore. The court held that the company was subject to personal jurisdiction in New York because it had availed itself of the benefits of the laws of the state to establish consistent and systematic contacts.¹⁴⁷ The company had offices in New York, offered publicly traded stock in New York and used the Internet to conduct business with New York residents. The company was also found to be doing business in New York because they advertised in New York and worked with a New York company to design their Internet gambling site.¹⁴⁸ The defendants also argued that the court lacked subject-matter jurisdiction and that Internet gambling was outside the scope of New York State gambling prohibitions because the gambling occurred outside the state. The court held, “under New York Penal Law, if the person engaged in gambling is located in New York, then New York is the location where the gambling occurred.”¹⁴⁹ Furthermore, it made no difference that funds were located offshore because “[t]he act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within New York State.”¹⁵⁰

While it may be a better strategy to rely on local authorities to carry the burden of law enforcement, there are still unresolved questions with regard to this particular ruling. This ruling could be considered incomplete because it forces oppo-

¹³⁸ See *Id.*

¹³⁹ See *Id.*; MICH. COMP. LAWS §750.145d (1999).

¹⁴⁰ Rose, *supra* note 51.

¹⁴¹ NEV. REV. STAT. §463.750 (2002).

¹⁴² *Id.* §463.750(1)-(2).

¹⁴³ Christina Binkley, *E-Business: Firms Bet on Online Gambling*, WALL ST. J., Jan. 14, 2002, at B4.

¹⁴⁴ See Schneider, *supra* note 112 (stating that approximately 4.7 million Americans gamble online).

¹⁴⁵ See Elaine Sciolino & Patrick E. Tyler, *A Nation Chal-*

lenged: Saddam Hussein: Some Pentagon Officials and Advisers Seek to Oust Iraq's Leader in War's Next Phase, N.Y. TIMES, Oct. 12, 2001 at B1; see also Eric Schmidt & Bernard Weinraub, *Battle for Baghdad Like War Plan: Kill Enemy, Limit Damage, Provide Aid*, N.Y. TIMES, Apr. 3, 2002, at B1.

¹⁴⁶ 714 N.Y.S.2d 844 (N.Y. Sup. 1999).

¹⁴⁷ *Id.* at 849-50.

¹⁴⁸ *Id.* at 849.

¹⁴⁹ *Id.* at 850.

¹⁵⁰ *Id.*

nents of Internet gaming to acknowledge that there may be no mechanism for establishing jurisdiction over a company that is conducting business online without any principal place of business within a jurisdiction or by way of a state long-arm statute.¹⁵¹ It cannot be determined if a simple minimum contacts analysis applied to the world of e-commerce would be inadequate or overbroad, or if it would withstand public policy scrutiny for trying to assert jurisdiction over companies that do not conduct business anywhere except on the Internet and outside United States borders.

These facts, taken in conjunction with the questions of federal jurisdiction, produce an almost circular argument against any prohibition on Internet gaming. If the Internet and e-commerce are questions of interstate commerce and federal jurisdiction, is this merely a question of deferring to the federal government? If federal lawmakers have in the past delegated authority to the states to license and regulate gaming, does this constitute a concession by Congress that gaming is simply not an issue they choose to regulate? Because gaming operations and regulations have traditionally been areas that are undertaken by state governments, have we found an area of the law in which federal supremacy must yield to the state? If a state, in turn, tries to prohibit such an activity, is the jurisdiction of state law enforcement confined to state boundaries? Any prohibition will likely lead to unmanageable results. Such concerns can be avoided by federal legalization with policing power authorized at the state level.¹⁵²

IV. THE OBSTACLES AGAINST EFFECTIVELY PROHIBITING INTERNET GAMBLING

A. Members of Congress: Question of An Outright Ban or Special Interest Exceptions

Numerous attempts to pass legislation that bans Internet gaming have been made since 1995.¹⁵³ Versions of congressional acts banning Internet gaming passed the Senate as early as 1998 when a bill by Senator Jon Kyl sailed through the Senate by a 90-10 vote.¹⁵⁴ Yet, despite the resounding passage of the Kyl Bill, the Senate did not heed warnings from the Justice Department of its overbreadth and unenforceability.¹⁵⁵ The Kyl Bill was later killed in a joint congressional budget committee.¹⁵⁶ It is likely that the Unlawful Internet Gambling Funding Prohibition Act could meet with the same fate as previous legislation. U.S. Representative Bob Goodlatte has joined Senator Kyl's crusade by introducing a bill that received a majority vote in the House of Representatives, but similar internal bickering over exceptions and special interest exemptions effectively killed the Goodlatte Bill as well.¹⁵⁷ This inability to protect all interests at stake is another possible outcome for the Unlawful Internet Gambling Funding Prohibition Act.

The divisiveness of Congress over the issue of Internet gambling is rooted in the problems of jurisdiction and enforcement. This division on gaming is not a result of party divisions. Rather, it turns on the views of members of Congress and their respective constituencies.¹⁵⁸ Currently, the Congressional Gaming Caucus studies the effects of gaming,¹⁵⁹ attempts to prevent the spread of misinformation regarding gaming, and studies its impact on individuals and society.¹⁶⁰ As recently as 2002, the CIGRMA passed the House Judiciary

¹⁵¹ See *State v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997) On appeal, the court held that the Minnesota long arm statute was adequate to establish jurisdiction over a Nevada company for false advertising for an online casino if at least one Minnesota resident was receiving the advertising. The case was not grounded in legality or illegality of online gaming but on fraudulent advertising. *Id.*

¹⁵² 25 U.S.C. §2710 (d)(3)(C)(iii).

¹⁵³ See *Penalties Outlined*, *supra* note 16, at 3.

¹⁵⁴ *Senate Passes Internet Gaming Ban*, *supra* note 20, at 1-2.

¹⁵⁵ *Id.*

¹⁵⁶ *Kyl Sneaks Net-Bet Ban Through Senate*, CASINO J. NAT'L GAMING SUMM. (Nat'l Gaming Industry, West Atlantic City, N.J.), Nov. 29, 1999, at 1.

¹⁵⁷ Rose, *supra* note 51.

¹⁵⁸ Rep. Frank LoBiondo, *Gaming offers economic benefits to many areas*, THE HILL, Aug. 1, 2001, at 14 (editorial by New Jersey Congressman, where state sponsored lottery and casino gambling are legal); Rep. Chris Cannon, *A balance between online rules and gambling*, THE HILL, July 10, 2002, at 33 (editorial by Congressman from Utah where no gambling is legal).

¹⁵⁹ LoBiondo, *supra* note 158, at 14; see Mary Lynn F. Jones, *The Hill Interview: Rep. Jim Gibbons*, THE HILL, Aug. 1, 2001, at 12 (discussing an interview with Nevada Republican about the Congressional Gaming Caucus founded by Gibbons & LoBiondo and efforts to combat misinformation about gaming).

¹⁶⁰ LoBiondo, *supra* note 158, at 14.

Committee.¹⁶¹ However, after a narrow passage by the Judiciary Committee, it became unlikely that the legislation would be ratified.¹⁶² Once again, the bill was brought down by the conflicts of special interests and the personal crusades of certain congressional members.¹⁶³

Opponents of online wagering concede that gambling has become too pervasive in American culture and society to ever be eliminated.¹⁶⁴ As a result, gambling must be regulated in order to mitigate any potential adverse consequences.¹⁶⁵ Due to the fact that Internet gambling has become a hot button issue on Capitol Hill, it has continued to receive much attention.

A previous version of the CIGRMA received popular support from both the American Gaming Association and the American Horse Council because certain exceptions for their industries were to be included in the bill.¹⁶⁶ Yet, this support vanished when a proposed amendment by a conservative Congressman planned to effectively nullify those exemptions.¹⁶⁷

This series of events illustrates the challenges lawmakers face when dealing with Internet gaming. Anti-gaming opinions seek to quash any and all types of regulation because of possible infringement on their own states.¹⁶⁸ Any support that may be garnered from powerful gaming interest groups disappears whenever a self-serving exception for them is eradicated, thus, keeping them out of the projected financial windfall that Internet gaming is likely to create for offshore companies.¹⁶⁹ Once again, the cycle of politics has dug itself into a hole of its own conflicting interests. The support needed to pass such a bill is always likely to disappear when such caveats for gaming are eliminated.¹⁷⁰ On the other hand, opponents of legalization continually seek to strike any portions that will favor such loopholes for those interest groups. This cycle creates the same

type of problematic cycle as determining jurisdiction.

This schism between lawmakers and interest groups inevitably stems from the question of who bears the responsibility for regulating the Internet. The responsibility of regulating the Internet is still in its infancy. While the federal government seeks to render whatever measures necessary to assert the responsibility as their own, credit card companies and state governments balk at the opportunity to take the responsibility themselves.¹⁷¹ The current legislation seeks to enlist credit card companies to police Internet gambling.¹⁷²

The fact that gambling is an issue that cannot seem to find solidarity amongst lawmakers exacerbates the ability to ratify any meaningful prohibition on Internet gambling. Members of Congress have brought issues such as the problems of amateur and college sports betting to the forefront, going so far as to request an outright ban on those activities.¹⁷³ Members are divided on the issue of Indian gaming and whether the Native American community genuinely feels its benefits or if the industry is simply preying upon impoverished Indian tribes.¹⁷⁴ The overall economic benefit of gaming is also a constant issue.¹⁷⁵ There does not appear to be any middle ground that lawmakers can agree.¹⁷⁶ This problem is now compounded by e-commerce and the fear among lawmakers regarding the dangers of regulating the Internet. A total prohibition, therefore, appears unlikely given these polarized opinions of legislators. The power of special interest groups with a stake in the outcome of any legislation further aggravates this problem.¹⁷⁷ Lawmakers have to face a reality that although prohibition is often proposed with the greatest public benefit in mind, it is not a panacea for all gambling problems.

¹⁶¹ See Goodlatte, *supra* note 4, at 33.

¹⁶² Michael S. Gerber, *Chances dim for 2002 ban on Internet gaming*, THE HILL, July, 10, 2002, at 35.

¹⁶³ *Id.*

¹⁶⁴ Rep. John LaFalce, *Legalized gambling is a national phenomenon*, THE HILL, Aug. 1, 2001, at 14.

¹⁶⁵ *Unlawful Internet Gambling Funding Prohibition Act and Combating Illegal Gambling Reform Act: Hearing on H.R. 556 and H.R. 3215 Before the House Subcommittee on Oversight and Investigation of the House Committee on Financial Services*, 107th Cong., (2001) (statement of Rep. John J. LaFalce).

¹⁶⁶ Gerber, *supra* note 162.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Hackers, *supra* note 9, at B7.

¹⁷⁰ Gerber, *supra* note 162, at 35.

¹⁷¹ *Id.*

¹⁷² *Unlawful Internet Gambling Funding Prohibition Act*, H.R. 556 §3(a)(1).

¹⁷³ Sen. John S. McCain, *It's past time to ban amateur sports gambling*, THE HILL, Aug. 1, 2001, at 13.

¹⁷⁴ Rep. Frank Wolf, *Gambling doesn't serve Native Americans well*, THE HILL, Aug. 1, 2001 at 17; See Sen. Ben Nighthorse Campbell, *Indian gaming: sensationalism and reality*, THE HILL, Aug. 1, 2001 at 17.

¹⁷⁵ LoBiondo, *supra* note 158 at 14.

¹⁷⁶ *Id.*; see also Cannon, *supra* note 158, at 33.

¹⁷⁷ Gerber, *supra* note 162, at 35.

B. The Eighteenth Amendment: A Historical Perspective on Prohibition of Popular Activity

The United States is rarely successful in endeavors to stop its citizens from participating in illicit activities. When a restriction is placed upon those activities, it does little to quell the appetites of those who wish to partake. The clearest example in American history is the failure of the "noble experiment."¹⁷⁸ This experiment was the enactment, and eventual repeal, of the Eighteenth Amendment, which prohibited intoxicating liquors.¹⁷⁹

The Eighteenth Amendment states, "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereto from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."¹⁸⁰ By passage of this amendment, the Prohibition era in the United States began on January 16, 1920.¹⁸¹

The ratification of this Amendment was a resounding victory for the Temperance movement. The American Temperance movement found its roots in the latter half of the nineteenth century,¹⁸² just as the sale and manufacture of liquor had emerged as a leading industry in the U.S.¹⁸³ The demand for liquor was high and its use was pervasive in American society.¹⁸⁴

The Temperance movement, much like opponents of Internet gambling, took a moral high ground insisting that the trade, manufacture and consumption of liquor was an evil to society, not unlike slavery, for which the only solution was total prohibition.¹⁸⁵ The newly emerging Prohibitionist political party of the late nineteenth century echoed the sentiment that banning the use of intoxicating liquor was essential to "prevent the moral diseases which lead to misery and

crime."¹⁸⁶ However, many Senators feared that such an infringement upon states' rights and such reckless expansion of federal police powers would eradicate federalism as they knew it, destroy state boundaries, and "result in the abolition of state governments."¹⁸⁷ Yet, Congressional leaders and the American public fell in line with the Prohibitionists.

When enforcement of the Eighteenth Amendment came to fruition, organized crime seized a unique opportunity.¹⁸⁸ Law enforcement was not prepared to meet the huge burdens of preventing the shipment of liquor into the United States.¹⁸⁹

As a result of the eradication of the liquor trade, gone were the high taxes levied on a business that accounted for twenty-three percent of all national taxes between 1873 and 1917.¹⁹⁰ To further burden this dilemma, the American public was reluctant to reimburse the extra tax revenue needed to recoup this huge deficit.¹⁹¹ Law enforcement efforts to curb the great demand for liquor were deemed both weak and ineffective.¹⁹² Due to the deficiency in tax revenue to support the increased demand for law enforcement, all Prohibitionists could do in response was demand "more respect for the Constitution."¹⁹³

Law enforcement was not the only enormous public policy nightmare the Prohibition Amendment was forced to confront. When offenders were eventually brought to trial, the judicial system encountered an administrative gridlock. Prohibition became an albatross on the entire federal judicial establishment.¹⁹⁴ In 1920, "5,095 of the 34,230 cases in federal courts concerned violations of the Volstead Act."¹⁹⁵ By 1929, the number of liquor violation cases in the same federal courts exploded to 75,298 prohibition cases in the federal system alone.¹⁹⁶ In this same period, the number of federal prison inmates more than doubled from just over 5,000 to 12,000 inmates.¹⁹⁷

¹⁷⁸ FRANCIS X. BUSCH, *ENEMIES OF THE STATE: NOTABLE AMERICAN TRIALS*, 177 (1998).

¹⁷⁹ U.S. CONST. amend. XVIII, §1.

¹⁸⁰ *Id.*

¹⁸¹ See BUSCH, *supra* note 178, at 177.

¹⁸² RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920*, at 22 (1995).

¹⁸³ *Id.* at 19.

¹⁸⁴ *Id.* at 19-20.

¹⁸⁵ *Id.* at 23-28.

¹⁸⁶ *Id.* at 23.

¹⁸⁷ *Id.* at 245.

¹⁸⁸ See BUSCH, *supra* note 178, at 177.

¹⁸⁹ ROBERT GRANT & JOSEPH KATZ, *THE GREAT TRIALS OF THE TWENTIES*, 101-102 (1998).

¹⁹⁰ HAMM, *supra* note 182, at 46.

¹⁹¹ GRANT & KATZ, *supra* note 189, at 102.

¹⁹² *Id.* at 103.

¹⁹³ *Id.*

¹⁹⁴ HAMM, *supra* note 182, at 267.

¹⁹⁵ *Id.*; see Volstead Act, ch. 85, 41 Stat. 305 (1919) (repealed 1935) (act to prohibit intoxicating beverages, commonly referred to as the "National Prohibition Act"); see ARTHUR W. BLAKEMORE, *BLAKEMORE ON PROHIBITION*, 71-72 (1923).

¹⁹⁶ HAMM, *supra* note 182, at 267.

¹⁹⁷ *Id.*

The problem of having to construct new prisons was compounded by the lack of federal tax dollars once available from liquor revenue.¹⁹⁸

The overburden of law enforcement prompted President Hoover to create a national commission to study the problems of law enforcement.¹⁹⁹ This commission did little to ameliorate the problems stemming from Prohibition. The only conclusive finding of the commission was that the Eighteenth Amendment was a complete failure and the only fruits it bore were "widespread bootlegging and official corruption, overburdened judicial and penal systems, lack of state support for enforcement, and damaged respect for the law."²⁰⁰

The immense problems it wrought, as well as a shift in culture and political thought from progressive reform to individual freedom,²⁰¹ lead to the crumble of popular support for prohibition.²⁰² The repercussions of the stock market crash and the social ramifications of the Great Depression lead to a political realignment of Congress, which in turn lead to the enactment of the Twenty-First Amendment.²⁰³

The Twenty-First Amendment states, "[t]he eighteenth article of amendment to the Constitution of the United States is hereby repealed."²⁰⁴ The federal government was forced to accept the failure of the Eighteenth Amendment's "concurrent enforcement" provision²⁰⁵ that allowed the states to abandon their own responsibilities of enforcing the law²⁰⁶ and, once again, delegated authority to the states to police this matter as they saw fit.²⁰⁷

The problems created by Prohibition far outweighed any benefits it may have conferred upon society.²⁰⁸ Internet gambling promises to mirror this kind of legislative backlash. The jurisdiction of any such ban presents similar problems. The question of jurisdiction over the Internet and gaming, respectively, could result in the same

kind of concurrent enforcement maelstrom that doomed Prohibition to its cataclysmic failure.

During Prohibition, the illegal liquor trade became the major force in the formation of organized crime and its rise to power.²⁰⁹ Prohibition gave organized crime a financial windfall for controlling the activity.²¹⁰ The inundation of liquor cases also proved unmanageable.²¹¹ This same problem is a likely result should lawmakers attempt to incarcerate those who wager on the Internet. The overburden of courts dealing with Prohibition violations resulted in the inevitable overcrowding of prisons,²¹² which would be another inevitable result of a ban should lawmakers decide to prosecute online gamblers. The parallels between the two activities are a historical justification against the prohibition of Internet gambling. It is a popular activity, with no rational means for enforcement of an outright ban. Because the arguments of opponents to Internet gambling mirror the same arguments of Prohibitionists, the failure of Prohibition should be a lesson to current legislators.

C. The Alleged Social Problems Associated With Internet Gambling: Prohibition Is Not A Solution

Opponents of Internet gambling stand upon the same types of arguments made by the Temperance movement over a century ago.²¹³ Congressman Goodlatte believes that "the spread of gambling brings with it the onslaught of a host of social ills including bankruptcy, addiction, family breakdown and even suicide."²¹⁴ Goodlatte stresses the easy access of Internet gaming sites as a temptation for both addicted gamblers and children.²¹⁵ Congressman Jim Leach echoes this sentiment and refers to children as the group most vulnerable to falling prey to Internet gambling.²¹⁶

¹⁹⁸ *Id.* at 268.

¹⁹⁹ *Id.* In 1929, President Hoover established The National Commission on Law Observance and Enforcement, commonly referred to as The Wickersham Commission, headed by chairman George Wickersham. *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 269.

²⁰² *Id.*

²⁰³ *Id.* at 270-271.

²⁰⁴ U.S. CONST. amend. XXI, §1.

²⁰⁵ U.S. CONST. amend XVIII, §2 ("The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.").

²⁰⁶ HAMM, *supra* note 182, at 266.

²⁰⁷ U.S. CONST. amend. XXI, §2.

²⁰⁸ HAMM, *supra* note 182, at 267.

²⁰⁹ ROBERT J. KELLY, ENCYCLOPEDIA OF ORGANIZED CRIME IN THE UNITED STATES: FROM CAPONE'S CHICAGO TO THE NEW URBAN UNDERWORLD, 246 (2000).

²¹⁰ GRANT & KATZ, *supra* note 189, at 107 (estimating that the personal windfall of Al Capone alone by 1928 had been more than \$100,000,000).

²¹¹ HAMM, *supra* note 182, at 267.

²¹² *Id.*

²¹³ HAMM, *supra* note 182, at 23-28.

²¹⁴ See Goodlatte, *supra* note 4, at 33.

²¹⁵ *Id.*

²¹⁶ *Unlawful Internet Gambling Funding Prohibition Act and*

The anti-Internet gambling brigade warns that college students with easy access to both the Internet and credit are also at risk.²¹⁷ Congressman Goodlatte's concerns do not end with gamblers and children but lament over the "billions of dollars being sucked out of our economy by hundreds of illegal, unregulated, untaxed offshore entities that are causing problems in communities just as if the community had a casino in their downtown."²¹⁸

Opponents preach that regulation of the Internet gaming industry is impossible and prohibition is the only solution.²¹⁹ Ironically, this position is exactly the same argument presented by the Temperance movement.²²⁰ Moreover, the anti-Internet gambling crusade ignores the fact that the problems they wish to address do not evaporate by simple prohibition, similar to the single-mindedness of the Temperance movement that failed to acknowledge that prohibition of alcohol would not remedy social issues.²²¹

One may concede that the desire to protect children is of paramount importance to all lawmakers. Congressman Oxley describes the scene of "Little Jimmy" stealing his parents' credit card and logging on to the latest online gambling site and breaking the family coffers.²²² But this scenario is unrealistic.²²³ When a credit card is stolen or used without the holder's approval, the cardholder is not responsible for more than fifty

dollars of those charges.²²⁴ This provision applies even when the holder's child uses the card and makes these debts "virtually unenforceable."²²⁵ Hence, Congressman Oxley's hypothetical is mere rhetoric.

While protecting children is a resounding theme among American politicians, the Supreme Court does not allow for this protection at the expense of constitutional rights.²²⁶ For example, the interest in protecting the guarantees of the First Amendment outweighs the interest in regulating online content.²²⁷ In addition, federal lawmakers neglect the reality that there are greater threats to the youth of America than gaining access to a credit card and an Internet site. Such problems that confront children on a daily basis include drugs,²²⁸ poor public education systems,²²⁹ and exploitation,²³⁰ to simply name a few.

The issue of addicted gamblers raises another factor that opponents often present: the interplay of illegal gambling and organized crime.²³¹ Second only to drugs, gambling represents the largest money making business for organized crime.²³² For decades, organized crime has infiltrated gambling in the United States and focuses activity on the areas of bookmaking and numbers.²³³ Gambling activities are of particular attractiveness to organized crime because of the low priority among law enforcement and relatively minimal penalties for violation.²³⁴ The tactic

Combating Illegal Gambling Reform Act: Hearing on H.R. 556 and H.R. 3215 Before the House Subcommittee on Oversight and Investigation of The House Committee on Financial Services, 107th Cong. (2001) (statement of Rep. James Leach).

²¹⁷ *Unlawful Internet Gambling Funding Prohibition Act and Combating Illegal Gambling Reform Act: Hearing on H.R. 556 and H.R. 3215 Before the House Subcommittee on Oversight and Investigation of The House Committee on Financial Services*, 107th Cong. (2001) (statement of Kenneth S. Whyte).

²¹⁸ *Unlawful Internet Gambling Funding Prohibition Act and Combating Illegal Gambling Reform Act: Hearing on H.R. 556 and H.R. 3215 Before the House Subcommittee on Oversight and Investigation of The House Committee on Financial Services*, 107th Cong. (2001) (statement of Rep. Robert Goodlatte).

²¹⁹ *Id.*

²²⁰ HAMM, *supra* note 182, at 23-28.

²²¹ *Id.* at 268-270.

²²² *Unlawful Internet Gambling Funding Prohibition Act and Combating Illegal Gambling Reform Act: Hearing on H.R. 556 and H.R. 3215 Before the House Subcommittee on Oversight and Investigation of The House Committee on Financial Services*, 107th Cong. (2001) (statement of Rep. Mike Oxley, Chairman of The House Committee on Financial Services).

²²³ Craig Lang, *Internet Gambling: Nevada Logs In*, 22 LOY. L.A. ENT. L. REV. 525, 547 (2002); see Theresa E. Loscalzo & Stephen J. Shapiro, *Internet Gambling Policy: Prohibition Versus*

Regulation, 7 VILL. SPORTS & ENT. L.J. 11, 13-15 (2000).

²²⁴ Lang, *supra* note 223, at 547.

²²⁵ *Id.*

²²⁶ See generally *Am. Library Ass'n*, 201 F. Supp. 2d 401.

²²⁷ *Id.*

²²⁸ See Lynn M. Paltrow, *The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and the Effects*, 28 S.U.L. REV. 201, 230-231 (2001); see also Curtis French, *For Safety's Sake: The Supreme Court's Justification for Student Drug Testing-Acton v. Vernonia School District*, 21 T. MARSHALL L. REV. 159 (1996).

²²⁹ See Walter E. Williams, *The False Civil Rights Vision*, 21 GA. L. REV. 1119, at 1138 (1987).

²³⁰ See Amy McCoy, *Children "Playing Sex For Money": A Brief History of the World's Battle Against the Commercial Sexual Exploitation of Children*, 18 N.Y.L. SCH. J. HUM. RTS. 499 (2002).

²³¹ PATRICK J. RYAN, *ORGANIZED CRIME*, 10-11 (1995).

²³² *Id.*

²³³ *Id.* at 12. Bookmaking is simply taking bets on sporting events. The "numbers racket" is based on "the total pari-mutuel wagering at one particular racetrack on a given day" and the final three numbers of the tally for that day become the winning numbers. This system is especially alluring to low-income persons because of payouts averaging 600-1 odds.

Id.

²³⁴ KELLY, *supra* note 209, at 130.

among organized crime for means of debt collection is usually one of violence.²³⁵ However, because Internet gambling requires credit cards and traceable bank instruments, it offers little incentive for organized crime to become involved.²³⁶ Any such ban on Internet gambling does not present a rational solution to the problem of organized crime.

The potential for fraud is also a legitimate concern. Players may continually fear non-payment of winnings from an offshore company. This concern is justified from the other side as well since online gamblers have sued the credit card companies in order to prevent enforcement of their online gaming debts as illegal contracts.²³⁷ Therefore, regulation of such an industry would ensure that all debts are legal and enforceable.²³⁸

The faction against Internet gaming also claims that gambling is a prime motivating factor in incidents of bankruptcy and suicide.²³⁹ A study conducted by the University of Nevada at Las Vegas in 1999 showed that seven percent of Las Vegas residents are problem gamblers and thirteen percent of all the bankruptcies filed in Las Vegas are gambling related.²⁴⁰ However, conditions vary from location to location and this study was focused exclusively on Las Vegas residents.²⁴¹ Nevertheless, bankruptcies associated with gambling are a subject in which opponents have ignored factual data. A clear example involves a recent Treasury Department study which showed that there was no link between gambling and bankruptcy.²⁴² The study also revealed there was no connection between the rise in the number of bankruptcies and the increased presence of gaming activity in the United States.²⁴³ Instead, the Treasury Depart-

ment attributed the rise in bankruptcies to other factors such as higher debt to income ratios, increased use of credit cards and the apparent disappearance of social stigma attached to declaring bankruptcy.²⁴⁴

The issue of suicide is a tentative one, at best. For example, a study conducted by David Phillips, professor of sociology at the University of California at San Diego, listed Las Vegas with the highest suicide rate in the country, but could not make any correlation to the expansion of gaming and suicide.²⁴⁵ The National Council on Problem Gambling also reported that approximately one in five addicted gamblers have attempted suicide.²⁴⁶ The American Association of Suicidology praised this study, but it also noted that the study was incomplete because it only focused on people who were problem gamblers and did not compare the suicide rates of gamblers and non-gamblers.²⁴⁷ Conversely, a Center For Disease Control and Prevention study did not mention gambling as a cause of suicide and listed factors such as limited economic opportunity and unstable social environments.²⁴⁸ While it appears that these studies acknowledge that suicide is a social problem, a ban on Internet gambling is not the answer.

The current issue of money laundering and its link to terrorism must also be addressed. Politicians believe that both organized crime and terrorists have been using Internet gambling sites as a means to launder illicit funds.²⁴⁹ The current war on terrorism has already passed counter-terrorism bills aimed at money laundering and increasing government surveillance.²⁵⁰ The idea that terrorists may be using Internet gambling to fund their activities is a chilling prospect, but it is

²³⁵ RYAN, *supra* note 231, at 242.

²³⁶ See Schneider, *supra* note 112.

²³⁷ See *In re Mastercard*, 132 F. Supp. 2d 468 (E.D. La. 2001) (granting defendants' motion to dismiss due to failure to state a case under RICO and the Federal Wire Act).

²³⁸ Lang, *supra* note 223, at 546.

²³⁹ See Goodlatte, *supra* note 4, at 33.

²⁴⁰ *Problem Gamblers 7% of LV Residents?*, CASINO J. NAT'L GAMING SUMM. (Nat'l Gaming Industry, West Atlantic City, N.J.), May 31, 1999, at 9.

²⁴¹ *Id.*

²⁴² *Treasury Report: No Connection Between Gaming and Bankruptcies*, CASINO J. NAT'L GAMING SUMM. (Nat'l Gaming Industry, West Atlantic City, N.J.), Aug. 23, 1999, at 5. This study also reveals that Tennessee has the highest bankruptcy rate in the country even though there is no casino gambling or lottery in that state. *Id.*

²⁴³ *Id.*

²⁴⁴ *Study Finds Indistinct Link Between Gambling, Bankruptcy*, WALL ST. J., Aug. 12, 1999.

²⁴⁵ *Study Finds Link Between Gaming, Suicide*, CASINO J. INT'L GAMING SUMM. (Nat'l Gaming Industry, West Atlantic City, N.J.), Dec. 22, 1997, at 4 [hereinafter *Study Finds Link*].

²⁴⁶ National Gambling Impact Study Commission Report, *Gambling's Impacts On People And Places*, at §7-25 [hereinafter *NGISC Report*].

²⁴⁷ See *Study Finds Link*, *supra* note 245, at 4.

²⁴⁸ *NGISC Report*, *supra* note 246, at §7-26 (citing reference to Christian Marfels, Ph.D., *Visitor Suicides and Problem Gambling in the Las Vegas Market: A Phenomenon in Search of Evidence*, 2 GAMING L. REV. NO. 5, at 472 (1998)).

²⁴⁹ Michael M. Phillips & Jess Bravin, *Terrorism and Money-Laundering Bills Make Business Lobbyists Walk Fine Line*, WALL ST. J., Oct. 16, 2001, at A28.

²⁵⁰ *Id.*

also one for which there is no credible support.²⁵¹ Because no suspected terrorist or terrorist organization has ever been investigated for laundering money through Internet gambling, the problem still lacks evidentiary proof.²⁵² Moreover, for terrorists, laundering funds online through gambling sites would be a daunting task. Money laundering requires a clandestine operation, but all e-commerce transactions paid via credit card are recorded.²⁵³ Even if there is a threat that terrorists are using Internet gambling to fund their operations, it is simply another reason why legalization and regulation of online gaming controlled by domestic interests is the only viable solution.

In the world of gambling there are no sure bets. The position of opponents will always be heard on this subject. Still, Congress and state legislatures must ensure that "the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations."²⁵⁴

D. Contemporary Failure Of Prohibition As A Remedy For Social Problems: The War On Drugs

Opponents of Internet gambling choose to hide behind slogans designed to instill fear in the hearts of their constituencies regarding the abhorrent dangers that will impact society if Internet gambling became a fixture in the United States.²⁵⁵ Should those opponents choose this platform to espouse the necessity for an Internet gambling ban, one needs to look no further for an example of how empty slogans and ineffective prohibition measures are not a solution to social problems than the War On Drugs.²⁵⁶

The War On Drugs has accomplished none of its goals.²⁵⁷ Not unlike the current fervor over banning Internet gambling, politicians hide behind words to improve their own public image in-

stead of realistically confronting the problem.²⁵⁸ Experts agree that education and treatment programs are the only way to combat the drug problem.²⁵⁹ But rather than address these issues, the government allows a moral panic ideology to cement its foundations in society.²⁶⁰

An outright ban of Internet gambling is not likely to yield the kind of disastrous results the War On Drugs has reaped. Legalization is not the absolute answer in the War on Drugs, but the two do share certain similarities. For example, the War on Drugs has demonstrated that criminal punishment as a deterrent is not a viable solution.²⁶¹ Prohibitionists stand on platforms of protection and prevention but give no logical explanation of a plan for enforcement. A major objective of the War On Drugs is to eliminate use by children. Yet, children continue to be an at-risk group for drug abuse²⁶² and drugs remain easy for children to obtain.²⁶³ The major correlation between drugs and the expansion of Internet gambling is that it is an activity in which people wish to partake.²⁶⁴ Problems arise when the major suppliers of the vice, in this case the offshore casino operator, can evade prosecution or be in business with a friendly U.S. government.²⁶⁵ Therefore, if the War On Drugs has taught the general public anything, it is that this type of militant criminalization, victimization and prohibition yields no results.

V. A WORKABLE SOLUTION

A. Legalization & Regulation: The Only Remedy

Strict regulation of Internet gaming activity can and will work.²⁶⁶ Money laundering, the protection of children and problem gambling are all issues that can be remedied through simple legalization and strict regulation. Given the fact that In-

²⁵¹ See Schneider, *supra* note 112.

²⁵² See Catania, *supra* note 8.

²⁵³ See Schneider, *supra* note 112.

²⁵⁴ *Greater New Orleans*, 527 U.S. at 173, 186.

²⁵⁵ See Goodlatte, *supra* note 4, at 33.

²⁵⁶ Debate, *The War On Drugs: Fighting Crime Or Wasting Time?*, 38 AM. CRIM. L. REV. 1537 at 1539-1540 (2001).

²⁵⁷ THE WAR ON DRUGS: ADDICTED TO FAILURE: *Recommendations of the Citizens Commission on U.S. Drug Policy*, at 8-10 (1999) [hereinafter WAR ON DRUGS] (conclusions of Commission Report).

²⁵⁸ *Id.* at 30.

²⁵⁹ *Id.* at 8-10.

²⁶⁰ See WAR ON DRUGS, *supra* note 257, at 58 (testimony of Craig Reinerman).

²⁶¹ Andrew D. Leipold, *The War On Drugs and the Puzzle of Deterrence*, 6 J. GENDER RACE & JUST. 111, 112-113 (2002).

²⁶² See WAR ON DRUGS, *supra* note 257, at 17 (testimony of Michael A. Males).

²⁶³ *Id.* at 25 (testimony of Paul Lewin).

²⁶⁴ Epifanio, *supra* note 3, at 39.

²⁶⁵ See WAR ON DRUGS, *supra* note 257, at 49 (testimony of Peter Dale Scott).

²⁶⁶ See Catania, *supra* note 8.

ternet gambling is already a business that generates billions of dollars a year in revenue,²⁶⁷ legalization will allow much needed tax dollars that prohibitionists complain currently go elsewhere,²⁶⁸ to be devoted to the social problems other programs have neglected.²⁶⁹

The first step is to enforce a policy that requires online casinos to have all players register with their sites.²⁷⁰ Due to the potential for fraud, such registration would need to include all pertinent personal identification information.²⁷¹ A system of verification must then be put into place to ensure that the information received by the casino is valid and accurate,²⁷² followed by an imposed general waiting period before online play can begin. This type of regulation will allow for certain immeasurable benefits. Primarily, it will help to limit, if not eradicate, abuse by minors.²⁷³ If a child cannot register and meet the online guidelines of a particular casino, there is no danger of the child stealing a parent's credit card and using it to gamble online. Verification of address information will also allow participating casinos to confirm whether there are any interstate commerce issues because it will help establish the location of each player. This regulation will also help mitigate the dangers of money laundering through offshore channels. If there is no anonymity associated with online gambling, money laundering operations would be dealing with funds that would be directly traceable to their enterprise.²⁷⁴ When a player has the benefit of a reputable casino and knows he can safely gamble online with that vendor, any need for the creation of blind e-cash is eliminated.²⁷⁵

The ability to track online players through a gaming site registered with the state is crucial to the elimination of money laundering as a prospective fear among opponents. The application of tools, such as data cross checks and age verification software, will lead to stricter regulation than

that to which land based casinos are currently subject.²⁷⁶ This technology will also allow casinos to more stringently monitor their patrons and impose such provisions as freezing accounts for inconsistent behavior and reporting all activities that are potentially suspicious.²⁷⁷

Another measure that can be implemented to reduce the risk of fraud is a network of communication between casinos that will identify problem gamblers and deny access to any patron with outstanding debt. Lastly, players would be given the ability to exclude themselves from play until an applicable "cooling off" period has elapsed.²⁷⁸ Collectively, these provisions will create a strong basis for monitoring Internet gaming activity and will help mitigate the issues associated with problem gamblers, access of children and money laundering.

The major benefit online gaming stands to bring is tax revenue. This benefit is one that foreign operators recognize, and has led many to petition Congress so that they may be allowed to pay U.S. taxes on gambling revenues.²⁷⁹ The rationale is that to reap the benefit of taxing this activity, they must allow it to be regulated. With the growth in online gaming, the potential for revenue is limitless.²⁸⁰ For example, this revenue can be used to fund social programs which aid addicted gamblers and educate children on the dangers of gambling.

B. A Template For Legalization: The Indian Gambling Regulatory Act

The Indian Gambling Regulatory Act²⁸¹ provides a viable blueprint for the legalization of Internet gambling. First among the criteria is licensing. The IGRA allows Native American Nations to negotiate with the state of jurisdiction to obtain gaming licenses under a "Tribal-State Com-

²⁶⁷ See *Hackers*, *supra* note 9, at B7.

²⁶⁸ See Goodlatte, *supra* note 4, at 33.

²⁶⁹ See e.g., WAR ON DRUGS, *supra* note 257, at 86-87 (testimony of Ricky Bluthenthal).

²⁷⁰ Frank Catania, *Internet Gaming Regulation: The Kahnawake Experience*, 5 CHAP. L. REV. 209, 221 (2002) [hereinafter *Kahnawake*].

²⁷¹ *Id.*

²⁷² Press Release, Interactive Gaming Council, *IGC Response to FATF Money Laundering Recommendations*, Interactive Gaming Council Press Release, Sept. 11, 2002, at www.igcouncil.org/read_news.php?id=3 [hereinafter *IGC Response*].

(regarding legalization of online gaming, stating that age verification software is already available online).

²⁷³ See *Kahnawake*, *supra* note 270, at 270.

²⁷⁴ See Schneider, *supra* note 112.

²⁷⁵ *Id.*

²⁷⁶ See *IGC Response*, *supra* note 272.

²⁷⁷ *Id.*

²⁷⁸ *Kahnawake*, *supra* note 270, at 221-222.

²⁷⁹ Jim VandeHei, *Why A Brit Hired A Lobbyist So He Could Pay U.S. Taxes*, WALL ST. J., May 13, 2002, at A1.

²⁸⁰ See Epifanio, *supra* note 3, at 39.

²⁸¹ 25 U.S.C. §2710.

pact.”²⁸² The IGRA allows Native Americans Nations to establish gaming operations in states where such gaming is legal and sanctioned by the state.²⁸³

To obtain a license, each respective Nation must first submit an application to the Chairman of the National Indian Gaming Commission and then it must be submitted to the state for approval.²⁸⁴ The National Indian Gaming Commission approves license applications, monitors, investigates and inspects gaming operations as well as imposes fines for violations of the IGRA.²⁸⁵ Once a gaming license is issued by the state, the Tribe, under the Tribal-State Compact, becomes fully subjected to the terms and conditions therein.²⁸⁶ This compact allows the respective states to assert jurisdiction over the Native American Nation for both civil and criminal gaming matters.²⁸⁷ The state is also allowed to reasonably tax the Nation to defer any costs of operation incurred by the state.²⁸⁸

The federal government has the ultimate power “to regulate Commerce . . . with the Indian Tribes” under the IGRA.²⁸⁹ Therefore, a federal commission, similar to the National Indian Gaming Commission, could be created by Congress to oversee Internet gaming activity without violating any commerce power.²⁹⁰ In addition, the IGRA effectively delegates power to the states to contract with the Native American Nations²⁹¹ and to police the activities of their casinos.²⁹² Allowing the states to deal directly with those who wish to establish online casinos, along with a national commission, will allow for proper screening of candidates to ensure the legitimacy of the online casino business. Granting the states the police power to monitor these activities will also further ease the burden on law enforcement because the states will be dealing with companies operating within their own states and subject to the laws of their own state. While no system is impenetrable, this proposed solution would satisfy the demands of Congress and would allow the states to retain their jurisdiction over gaming.

Though legalized gaming has not solved all the problems of Native American communities,²⁹³ its remarkable success has provided a disenfranchised people with a well-run industry that has helped improve impoverished Native American communities²⁹⁴ and has delivered more in material success than any other government effort.²⁹⁵ There is no apparent reason why the success of the IGRA cannot be duplicated for Internet gambling.

VI. CONCLUSION

There is more potential for increased harm and diminished rights should a complete prohibition on Internet casino gambling become law. Such a ban will likely face a constitutional challenge under the First Amendment. It is unknown what would happen in such a suit, but the judicial system has upheld such challenges as a restriction of online content as violation of the freedom of speech. A Fourth Amendment privacy challenge is also likely because a prohibition of Internet gambling will raise questions regarding one’s personal privacy.

The constitutional challenges do not end with the Bill of Rights. A separation of powers attack on the federal government will probably result in holdings similar to *Seminole Tribe*²⁹⁶ and *Greater New Orleans*,²⁹⁷ which supported the right of the states to regulate gaming. Since gaming has been left to the states since the dawn of our nation, there does not appear to be a viable argument federal lawmakers can make to change that assumption.

Policing illicit activities online has proven difficult and Internet gaming promises to be just as unmanageable. The type of law enforcement needed to police these types of activities would be a drain on tax dollars and will eventually limit individual freedoms. This problem is exacerbated when dealing abroad because merely imposing injunctions on foreign companies while sending

²⁸² *Id.* § 2710 (d)(1)(A)-(d)(1)(C).

²⁸³ *Id.* §2710 (b)(1)(A).

²⁸⁴ *Id.* §2710 (b)(1)(B).

²⁸⁵ *Id.* §2706 (a)(b) (2001).

²⁸⁶ *Id.* §2710 (d)(2)(C).

²⁸⁷ *Id.* §2710 (d)(3)(C)(ii).

²⁸⁸ *Id.* §2710 (d)(3)(C)(iii).

²⁸⁹ *Id.* §§2704-2706.

²⁹⁰ *Id.*

²⁹¹ 25 U.S.C §2710 (d)(1)(B).

²⁹² *Id.* §2710 (d)(3)(C)(ii).

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ See *Seminole Tribe*, 517 U.S. 44, 62.

²⁹⁷ See *Greater New Orleans*, 527 U.S. 173, 183-186.

American citizens to jail for the same crime cannot be deemed a rational scheme of justice.

History has proven the dangers of prohibition. Opportunity for organized crime and money laundering, expansion of police power at the cost of civil liberties and overcrowded courts and prisons are the inevitable results. The United States must learn from its own mistakes.

Legalization and stringent regulation present a solution that can be implemented and continually

improved. Congress must address the actual problems confronting our society before it can create new problems without foundation and politics from a pulpit of fear. One may only be hopeful that lawmakers will look beyond slogans and party platforms in order to maximize the benefits for their constituents and the United States. Until that time, we may only have what Native Americans now have as a result of legalized gaming: hope.

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